

**Dodson v Teacher's Retirement Sys. of the City of  
N.Y.**

2020 NY Slip Op 30749(U)

March 11, 2020

Supreme Court, New York County

Docket Number: 152398/19

Judge: Lynn R. Kotler

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8
DECISION/JUDGMENT
INDEX NO. 152398/19

DANA DODSON

MOT. DATE

- v -

MOT. SEQ. NO. 001

TEACHERS' RETIREMENT SYSTEM OF THE CITY
OF NEW YORK et al.

The following papers were read on this motion to/for article 78
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits
Notice of Cross-Motion/Answering Affidavits — Exhibits
Replying Affidavits

This is an Article 78 proceeding seeking challenging the determination made by respondents denying petitioner an Accidental Disability Retirement ("ADR") pension payable under the provisions of the Retirement and Social Security Law § 605, and for a further order directing payment of such pension, or in the alternative for an order remanding the matter for further review. Respondents have answered the petition and oppose it.

This proceeding arises from an incident where petitioner, a physical education teacher and dean of students with the New York City Department of Education ("DOE"), was physically attacked while trying to break up an altercation between students at the school he worked at. This incident occurred on January 20, 2015. Specifically, petitioner claims that during his lunch room duty supervision of the gymnasium at a DOE school, he was leapt upon suddenly from behind and hit in the head and neck by a student who had been fighting with another student. According to the incident report, the blow to the head and neck took petitioner's breath away, and he fell on his knee as his back locked with pain. Petitioner never went back to work after the incident.

Prior to the incident, petitioner suffered from back and neck pain. In 2010, an MRI revealed that he suffered from degenerative disc disease and had herniated disks in his back. The day after the underlying incident, petitioner went to Dr. Michael Nicolosi, D.O., who diagnosed the petitioner with lumbar radiculopathy and lumbar disc displacement without myelopathy, and recommended that he undergo an MRI. On January 29, 2015, petitioner underwent another MRI which revealed: "(1) Posterior annular disc bulge at T11/T12; (2) Posterior subligamentous disc bulges at L1/2 and L2/3. There is posterior annular disc bulge at L3/4; (3) Posterior central disc herniation slightly favoring the left at L4/5 impresses the ventral thecal sac and abuts the left L5 nerve root as it approaches the lateral recess; and (4) posterior disc herniation favoring the right at L5/S1 impresses the ventral thecal sac and right greater than left S1

Dated: 3/11/20

HON. LYNN R. KOTLER, J.S.C.

- 1. Check one: [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION
2. Check as appropriate: Motion is [ ] GRANTED [X] DENIED [ ] GRANTED IN PART [ ] OTHER
3. Check if appropriate: [ ] SETTLE ORDER [ ] SUBMIT ORDER [ ] DO NOT POST
[ ] FIDUCIARY APPOINTMENT [ ] REFERENCE

nerve roots as they approach the lateral recesses and there is bilateral foraminal extension and narrowing due to facet hypertrophy with impingement upon the exiting L5 nerve roots.”

Petitioner saw Dr. Nicolosi again on March 23, 2015 with the same complaints of pain. Dr. Nicolosi recommended that petitioner undergo an epidural steroid injection. On June 1, 2015, petitioner received a Bursa injection.

Meanwhile, petitioner also saw Dr. Robert Hecht which confirmed many of Dr. Nicolosi's findings. In a report dated April 15, 2015, Dr. Hecht opined that petitioner was totally disabled. Petitioner also saw Dr. Paul Kubiak at the same office as Dr. Hecht, who noted that “[t]herapies have been minimally helpful”, that petitioner suffers from “low back pain with lower extremity radiculopathy” and directed petitioner to follow up with Dr. Grewal “following his epidural steroid injection to discuss[] the possibility of any surgeries if pains continue.”

Petitioner continued to treat with his pain management doctor by receiving epidural injections. His medical insurance refused to approve physical therapy. Petitioner saw Dr. Grewal, D.O. on March 31, 2016, who recommended petitioner undergo lumbar spine surgery. Dr. Grewal examined petitioner on April 16, 2016 and his report indicated that petitioner suffered from an antalgic gait, and restricted range of motion in the lumbar spine. The 4/16/16 report further noted that the petitioner had significant lumbar radiculopathy, positive tension sign, advanced degeneration of the lumbar spine, and that symptoms “worsened after a work-related injury likely exacerbating the underlying pathology.”

Petitioner had another MRI on June 23, 2016, which revealed the following impression:

Posterior annular disc bulges at T11/12, subligamentous disc bulges at T12/L1 and L1/2 and posterior annular disc bulge at L2/3.

Posterior central disc herniation slightly favoring the left remains at L4/5. Right paracentral disc herniation remains at L5/S1 with bilateral foraminal extension and narrowing impinging upon the exiting L5 nerve roots.

There is facet hypertrophy L4/5 and L5/S1

Slight curvature of the lumbar spine convex to the left

Petitioner then saw Dr. George V. DiGiacinto, M.D., a neurosurgeon at Mount Sinai, who recommended that petitioner undergo an L4-L5 and L5-S1 lumbar fusion. Petitioner had said surgery on November 17, 2016. In a March 17, 2017 report, Dr. DiGiacinto noted that petitioner still had “a great deal of back and especially right-sided pain radiation to his hip”, an antalgic gait and markedly restricted range of motion in the lumbar spine with muscle spasms.

Petitioner saw Dr. Klinger on April 21, 2017, who found that petitioner had, *inter alia*, right foot drop, positive straight leg raise test, and lumbar radiculopathy. A subsequent MRI revealed arthritis in petitioner's hip. On May 9, 2016, Dr. Giacinto opined after a physical exam that it would be “impossible for [petitioner] to go through a full school day.” Petitioner continued to receive injections from Dr. Nicolosi.

Ultimately, despite the surgery and multiple injections and medications, petitioner continued to suffer from pain and chronic numbness. On July 27, 2017, petitioner was awarded Social Security Disability benefits by Administrative Law Judge David J. Begley. ALJ Begley indicated that the petitioner had the capacity to “perform sedentary work...except he would need to alternate sitting and standing to alleviate pain and discomfort at 15-minute intervals. Also, he is prohibited from climbing ladders, ropes, and scaffolds. He is further limited to occasional climbing of ramps and stairs, balancing, stooping, kneeling, crouching, and crawling. Additionally, he would need to avoid concentrated exposure to extreme cold and heat and to humidity and wetness. He also would need to avoid slippery and uneven surfaces surface as well as hazardous machinery, unprotected heights, and open flames.”

### The challenged determination

Petitioner submitted an application for ADR benefits which was received by respondent on October 21, 2015. In his application, plaintiff noted that a "disruptive student ran into [his] back during an altercation" and that he now suffers from "back pain radiating into both legs." On November 9, 2015, petitioner appeared before respondent's Medical Board. Based on its review of the medical documentation, and its interview and examination of petitioner, the Medical Board found that there was insufficient clinical and documentary evidence that petitioner was unable to perform his usual duties. The Medical Board also found that the incident on January 20, 2015 does not meet the definition of an accident. Petitioner thereafter appeared several times before the Medical Board which, in turn, repeatedly denied petitioner's application and/or reaffirmed its prior determination.

The final challenged determination which was rendered November 14, 2018 provides as follows:

The Medical Board reaffirms our earlier decision in denying the member's application for Accident Disability retirement. Once again, the member continues to display full functional use of both lower extremities despite chronic subjective complaints of low back and leg discomfort. The Medical Board also notes that the member was able to come to the examination today by himself from Long Island with the use of public transportation. We further note that the member is able to walk completely independently without the use of a cane and that his gait is not antalgic despite the use of a cane at the time of the evaluation. Once again, there are no objective findings to substantiate that the member sustained a permanent, career-ending, line-of duty injury as a consequence of the events of January 20, 2015. We also note that the member was involved in a motor vehicle accident on July 25, 2018. The fact that the member was driving independently further dismisses his complaints of disability on a permanent basis. We also note based on the member's own statement as the member's own treatment notes from his own pain management specialist, that his lumbar pain was exacerbated a result of the car accident on July 25, 2018. The findings of paraspinal spasms are most likely attributed to his new event, that being on July 25, 2018. These spasms were never noted on previous examination. Despite the evidence of some paraspinal spasms, the member continues to display full functional use his lower extremities and once again is in no way permanently disabled from performing his duties as a New York City teacher as a consequence of the events of January 20, 2015.

Petitioner maintains that respondent's determination is irrational, arbitrary and capricious. Specifically, he points to its findings that he was not disabled, questioning its medical determination in light of the two-level spinal fusion surgery he underwent, his subjective complaints of pain confirmed by the pain medications he takes, the fact that he cannot drive for long periods of time and that he moved his bedroom downstairs due to the difficulty he experiences ambulating up and down stairs.

Meanwhile, respondent, maintains that the Medical Board reasonably concluded that Petitioner failed to demonstrate that he was disabled for the performance of gainful employment as a result of any of the alleged medical conditions. It notes findings based upon its own examination and diagnosis of petitioner that he had full functional use of both lower extremities and, thus, the absence of any limitation. Respondent also points to a report by Dr. Michael Rubin, a neurologist, who examined petitioner and found, *inter alia*, "[n]o objective findings" "MRI bulges are normal for age", "[n]o evidence for disability" and concluded that petitioner could return to work. Respondent further maintains that the ALJ's determination regarding Social Security Disability benefits is of no moment since another agency's determination is not binding on respondent.

### **Discussion**

In an Article 78 proceeding, the applicable standard of review is whether the administrative decision: was made in violation of lawful procedure; affected by an error of law; or arbitrary, capricious or an

abuse of discretion, including whether the penalty imposed was an abuse of discretion (CPLR § 7803 [3]). An agency abuses its exercise of discretion if it lacks a rational basis in its administrative orders. "[T]he proper test is whether there is a rational basis for the administrative orders, the review not being of determinations made after quasi-judicial hearings required by statute or law" (Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222, 231 [1974] [emphasis removed]; see also Matter of Colton v. Berman, 21 NY2d 322, 329 [1967]).

To be entitled to ADR benefits pursuant to RSSL § 605(b)(3), petitioner must show that he "is physically or mentally incapacitated for performance of gainful employment as the natural and proximate result of an accident not caused by his own willful negligence sustained in the performance of his duties in active service while actually a member of the retirement system[.]"

Petitioner bears the burden of proof before the Medical Board, and the Medical Board is entitled to accept its own medical opinion even when contrary to those of petitioner's experts (see *Carboni v. Teachers Retirement System of City of New York*, 184 AD2d 448 [1st Dept 1992]). "[T]he resolution of a conflict in the medical evidence is solely within the province of the medical board" (*Topkin v. Board of Educ. of City School Dist. Of New York*, 121 AD2d 531 [2d Dept 1986]).

Here, the court finds that respondent's determination is rationally supported by its own examinations and other records in petitioner's medical file. Indeed, Dr. Rubin found that petitioner was not disabled. Contrary to petitioner's contention, the Medical Board was entitled to reject the opinions offered by his treating physicians and conclude that petitioner was not disabled.


Accordingly, it is hereby **ADJUDGED** that the petition is denied and this proceeding is dismissed.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Judgment of the court.

Dated:

3/11/20  
New York, New York

So Ordered:

  
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Hon. Lynn R. Kotler, J.S.C.